UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

NANCY L. SCHEIBEL, Plaintiff, v. MICHAEL J. ASTRUE, Commissioner of Social Security, Defendant.	CASE NO. C10-948-JLR-MAT REPORT AND RECOMMENDATION

Plaintiff Nancy L. Scheibel appeals the final decision of the Commissioner of the Social Security Administration ("Commissioner") which denied her application for Disability Insurance Benefits ("DIB") under Title II of the Social Security Act, 42 U.S.C. §§ 401-33, after a hearing before an administrative law judge ("ALJ"). For the reasons set forth below, the Court recommends that the Commissioner's decision be REVERSED and REMANDED.

I. FACTS AND PROCEDURAL HISTORY

Plaintiff was born in 1957 and was 49 years old at the time of the hearing before the ALJ. (Administrative Record ("AR") 83.) She has at least a high school education. (AR 25.) Her past work experience includes employment as a bank teller, cashier, phone solicitor,

green house worker, and dry cleaning counter person. *Id*. Plaintiff asserts that she is disabled due to physical and mental problems, including lower back pain, diabetes mellitus with neuropathy, obesity, hypertension, sleep apnea, right renal artery disease, depression, and attention deficit disorder ("ADD"). (Dkt. 13 at 2.) She asserts an onset date of January 1, 2004. (AR 83-85.)

Plaintiff was previously found disabled for a closed period of time between June 8, 1995, through September 29, 1999. (AR 60-63.) Additionally, plaintiff was previously found disabled as of her 50th birthday in a separate application filed with the Social Security Administration. (AR 7.) The specific issue here is whether plaintiff was disabled at any time between January 1, 2004, and the date she attained age 50.

The Commissioner denied plaintiff's claim initially and on reconsideration. (AR 66, 70.) The Plaintiff requested a hearing, which took place on July 11, 2007. (AR 72, 928-49.) The plaintiff appeared and testified at the hearing in Bellingham, Washington. (AR 16, 928-49.) On October 11, 2007, the ALJ issued a decision finding the plaintiff not disabled. (AR at 16-26.)

Plaintiff's administrative appeal of the ALJ's decision was denied by the Appeals Council, making the ALJ's ruling the "final decision" of the Commissioner as that term is defined by 42 U.S.C. § 405(g). (AR 6-10.) On June 9, 2010, plaintiff timely filed the present action challenging the Commissioner's decision. (Dkt. No. 1.)

II. JURISDICTION

Jurisdiction to review the Commissioner's decision exists pursuant to 42 U.S.C. §§ 405(g) and 1383(c)(3).

III. STANDARD OF REVIEW

Pursuant to 42 U.S.C. § 405(g), this Court may set aside the Commissioner's denial of social security benefits when the ALJ's findings are based on legal error or not supported by substantial evidence in the record as a whole. *Bayliss v. Barnhart*, 427 F.3d 1211, 1214 (9th Cir. 2005). "Substantial evidence" is more than a scintilla, less than a preponderance, and is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Richardson v. Perales*, 402 U.S. 389, 201 (1971); *Magallanes v. Bowen*, 881 F.2d 747, 750 (9th Cir. 1989). The ALJ is responsible for determining credibility, resolving conflicts in medical testimony, and resolving any other ambiguities that might exist. *Andrews v. Shalala*, 53 F.3d 1035, 1039 (9th Cir. 1995). While the Court is required to examine the record as a whole, it may neither reweigh the evidence nor substitute its judgment for that of the Commissioner. *Thomas v. Barnhart*, 278 F.3d 947, 954 (9th Cir. 2002). When the evidence is susceptible to more than one rational interpretation, it is the Commissioner's conclusion that must be upheld. *Id*.

The Court may direct an award of benefits where "the record has been fully developed and further administrative proceedings would serve no useful purpose." *McCartey v. Massanari*, 298 F.3d 1072, 1076 (9th Cir. 2002)(citing *Smolen v. Chater*, 80 F.3d 1273, 1292 (9th Cir. 1996)). The Court may find that this occurs when:

> (1) the ALJ has failed to provide legally sufficient reasons for rejecting the claimant's evidence; (2) there are no outstanding issues that must be resolved before a determination of disability can be made; and (3) it is clear from the record that the ALJ would be required to find the claimant disabled if he considered the claimant's evidence.

Id. at 1076-77.

IV. DISCUSSION

As the claimant, Ms. Scheibel bears the burden of proving that she is disabled within the meaning of the Act. *Meanel v. Apfel*, 172 F.3d 1111, 1113 (9th Cir. 1999). The Act defines disability as the "inability to engage in any substantial gainful activity" due to a physical or mental impairment which has lasted, or is expected to last, for a continuous period of not less than twelve months. 42 U.S.C. §§ 423(d)(1)(A), 1382c(a)(3)(A). A claimant is disabled under the Act only if her impairments are of such severity that she is unable to do her previous work, and cannot, considering her age, education, and work experience, engage in any other substantial gainful activity existing in the national economy. 42 U.S.C. § 423(d)(2)(A); *see also Tackett v. Apfel*, 180 F.3d 1094, 1098-99 (9th Cir. 1999).

The Commissioner follows a five-step sequential evaluation process for determining whether a claimant is disabled. *See* 20 C.F.R. §§ 404.1520, 416.920 (2000). At step one, it must be determined whether the claimant is gainfully employed. The ALJ found plaintiff had not engaged in substantial gainful activity since January 1, 2004, the alleged onset date. (AR 18.) At step two, it must be determined whether the claimant suffers from a severe impairment. The ALJ found plaintiff had the following severe impairments: obesity, renal artery with a stent, hypertension, diabetic neuropathy, and amputated toe. (AR 18-21.) Step three asks whether the claimant's impairments meet or equal a listed impairment. The ALJ found plaintiff did not have an impairment or combination of impairments that met or equaled a listed impairment. (AR 22.) If the claimant's impairments do not meet or equal a listing, the Commissioner must assess residual functional capacity ("RFC") and determine at step four whether the claimant has demonstrated an inability to perform past relevant work. The ALJ

found plaintiff had the RFC to perform the full range of sedentary work. *Id*. However, the ALJ found plaintiff was unable to perform any of her past relevant work. (AR 25.) If the claimant is able to perform her past relevant work, she is not disabled; if the opposite is true, then the burden shifts to the Commissioner at step five to show that the claimant can perform other work that exists in significant numbers in the national economy, taking into consideration the claimant's RFC, age, education, and work experience. 20 C.F.R. §§ 404.1520(g), 416.920(g); *Tackett v. Apfel*, 180 F.3d 1094, 1099-1100 (9th Cir. 1999). The ALJ found, based on the plaintiff's age, education, work experience, and RFC, that there are jobs that exist in significant numbers in the national economy that plaintiff could perform. (AR 26.) The ALJ concluded that plaintiff had not been under a disability from January 1, 2004, through the date of the decision. *Id*.

Plaintiff contends that the ALJ erred by (1) improperly evaluating the severity of her back and mental impairments at step two; (2) improperly evaluating her RFC; (3) improperly evaluating her obesity impairment at step three; and (4) improperly evaluated her credibility regarding her obesity related limitations. (Dkt. 13.) She requests remand for an award of benefits, or, alternatively, for further administrative proceedings. *Id*. at 24. The Commissioner argues that the ALJ's decision is supported by substantial evidence and should be affirmed. (Dkt. 14.) For the reasons described below, the Court agrees with the plaintiff.

A. Step Two Severity Analysis

At step two, a claimant must make a threshold showing that her medically determinable impairments significantly limit her ability to perform basic work activities. *See Bowen v. Yuckert*, 482 U.S. 137, 145, 107 S. Ct. 2287, 96 L. Ed. 2d 119 (1987); 20 C.F.R. §§

404.1520(c), 416.920(c). "Basic work activities" refers to "the abilities and aptitudes necessary to do most jobs," including walking, standing, sitting, lifting, pushing, pulling, reaching, carrying, handling, seeing, hearing, speaking, understanding, carrying out and remembering simple instructions, using judgment, and dealing with changes in a routine work setting. 20 C.F.R. §§ 404.1521(b), 416.921(b). "An impairment or combination of impairments can be found 'not severe' only if the evidence establishes a slight abnormality that has 'no more than a minimal effect on an individual's ability to work.'" *Smolen*, 80 F.3d at 1290 (quoting Social Security Ruling ("SSR") 85-28). "[T]he step two inquiry is a de minimis screening device to dispose of groundless claims." *Id*. (citing *Bowen*, 482 U.S. at 153-54). An ALJ is also required to consider the "combined effect" of an individual's impairments in considering severity. *Id*.

1. Severity of Back Impairment

As indicated above, the ALJ found plaintiff had the following severe impairments: obesity, renal artery with a stent, hypertension, diabetic neuropathy, and amputated toe. (AR 18-21.) However, the ALJ failed to address plaintiff's back impairment at step two. The ALJ noted at step four that plaintiff "testified that she was unable to work due to pain in her lower back," but made no further mention of it in his findings. (AR 23.) The plaintiff argues that the ALJ's failure to find her back impairment severe at step two was legal error. (Dkt. 13 at 6-12.) She contends that the ALJ improperly ignored her testimony as well as the medical evidence of her back impairment at step two and throughout the remainder of his disability evaluation. *Id*. The Court agrees that the ALJ erred in his treatment of plaintiff's back impairment.

As set forth in the Commissioner's own regulations, a severe impairment or combination of impairments exists when the evidence establishes "more than a minimal effect on an individual's ability to work." SSR 85-28 (citing 20 C.F.R. §§ 404.1520, 404.1521, 416.920(c), 416.921); *see also* SSR 96-3p. The prevailing view is that only a "slight abnormality" or combination of slight abnormalities that minimally affect an individual's ability to work can be considered non-severe. *See, e.g.*, *Smolen*, 80 F.3d at 1290. Thus, the regulatory severity test is quite lenient, and is generally employed only as an administrative convenience designed to screen out totally groundless claims. *Id*. An overly stringent interpretation of the severity requirement violates the statutory standard for disability. *Id*.

Plaintiff alleges that in 2004 she had a recurrence of long-standing back problems (low back pain) that interfered with her ability to work. (Dkt. 13 at 4.) During the relevant time period, plaintiff was diagnosed with chronic low back pain, disc herniation, spinal stenosis, lumbar spondylosis, facet joint disease, and lumbar intervertebral degenerative disc disease. (AR 321, 475, 538-94, 601-03, 654, 691, 875-76, 878.) These diagnoses were based on objective medical evidence, including physical examinations and radiological studies. *Id*. In October 2004, plaintiff received a course of physical therapy for her lower back pain. (AR 878-79.) Additionally, in 2006, plaintiff underwent four epidural steroid injections as well as thermal radiofrequency ablation of her right L4-5 and L5-S1 facet joints. (AR 550, 555-56, 567, 574, 578-79.) There is also evidence that this condition negatively impacted her ability to perform basic work related activities. (AR 178-203, 601, 654, 878-79, 407.) Certainly, this evidence suggests that plaintiff's low back pain might have met the "de minimis" severity standard of step two. However, the ALJ did not analyze this evidence.

The Commissioner argues that any error in failing to address plaintiff's back impairment at step two was harmless "because the ALJ specifically referenced physical RFC findings from state agency physician, Robert Hoskins, M.D., . . . [who] found, based on all of Plaintiff's impairments, including a back impairment, that plaintiff was limited to sedentary work." (Dkt. 14 at 4.) The Commissioner further contends that "Plaintiff has not demonstrated how the severity finding of an impairment was harmful." *Id*. The Court disagrees with the Commissioner.

The Ninth Circuit has concluded that any error at step two is harmless when an ALJ accounts for impairment-related limitations in subsequent steps of the disability evaluation. *See Lewis v. Astrue*, 498 F.3d 909, 911 (9th Cir. 2007). Here, however, there is no indication that the ALJ properly considered the impact of plaintiff's back impairment at later steps. Although the ALJ relied on Dr. Hoskins' Physical Residual Functional Capacity Assessment, Dr. Hoskins's assessment dated May 7, 2005, predates nearly all of plaintiff's medical records related to her back impairment, including plaintiff's treatment at Mt. Baker Spine Center, radiological studies, lumbar steroid injections, and lumbar radiofrequency neurotomy. Furthermore, although Dr. Hoskins referenced plaintiff's back impairment, he did not include any back related limitations in his RFC assessment because there were no diagnoses or objective findings at the time of his assessment. (AR 293-94.) As Dr. Hoskins's RFC assessment states, the "[medical evidence of record] indicates a history of [low back pain], but no objective findings in [medical evidence of record] since [alleged onset date], and, no recent diagnosis with regards to [low back pain]." *See id*. Moreover, the ALJ made no effort to address the subsequent medical evidence in his decision, thus it is unlikely the ALJ considered

plaintiff's back impairment alone or in combination with her other impairments at subsequent steps in the evaluation process.

Even if the evidence does not establish that plaintiff's diagnosed back impairments cause more than a "slight abnormality," the ALJ erred by failing to address them at step two and by failing to consider their effects in combination with other severe impairments throughout the sequential evaluation process. Accordingly, the Court finds the ALJ's error in failing to address plaintiff's back impairment was not harmless, and this case must be remanded to the Commissioner to consider plaintiff's back impairment.

2. Severity of Mental Impairments

Plaintiff also assigns error to the ALJ's determination that her mental impairments were nonsevere. (Dkt. 13 at 19-24.) Plaintiff avers that the ALJ relied on outdated assessments and that the medical evidence establishes that her depression and ADD caused at least moderate limitations and, therefore, were severe. *Id*. She argues that the ALJ failed to provide specific and legitimate reasons for disregarding the opinions of nonexamining psychologist Thomas Clifford, Ph.D., examining psychiatrist David Sandvik, M.D., treating primary care physician Bruce Pederson, M.D., and treating psychologist Jeffrey Steger, Ph.D. *Id*. at 19-23. The Commissioner disagrees and responds that the ALJ properly assessed the severity of plaintiff's mental impairments and gave sufficient reasons for rejecting the opinion of Dr. Sandvik. (Dkt. 14 at 3-5.)

In determining whether a claimant has a severe impairment, the ALJ must evaluate the medical evidence and explain the weight given to the opinions of accepted medical sources in the record. The regulations distinguish among the opinions of three types of accepted medical

sources: (1) sources who have treated the plaintiff; (2) sources who have examined the plaintiff; and (3) sources who have neither examined nor treated the plaintiff, but express their opinion based upon a review of the plaintiff's medical records. *See* 20 C.F.R. §§ 404.1527, 416.927; *see also Lester v. Chater*, 81 F.3d 821, 830 (9th Cir. 1995).

In general, more weight should be given to the opinion of a treating physician than to a non-treating physician, and more weight to the opinion of an examining physician than to a non-examining physician. *Id.* Where not contradicted by another physician, a treating or examining physician's opinion may be rejected only for "'clear and convincing'" reasons. *Id*. (quoting *Baxter v. Sullivan*, 923 F.2d 1391, 1396 (9th Cir. 1991)). Where contradicted, a treating or examining physician's opinion may not be rejected without "'specific and legitimate reasons' supported by substantial evidence in the record for so doing." *Id*. at 830-31 (quoting *Murray v. Heckler*, 722 F.2d 499, 502 (9th Cir. 1983)).

The ALJ may reject physicians' opinions "by setting out a detailed and thorough summary of the facts and conflicting clinical evidence, stating his interpretation thereof, and making findings." *Reddick v. Chater*, 157 F.3d 715, 725 (9th Cir. 1998) (citing *Magallanes*, 881 F.2d at 751). Rather than merely stating his conclusions, the ALJ "must set forth his own interpretations and explain why they, rather than the doctors', are correct." *Id*. (citing *Embrey v. Bowen*, 849 F.2d 418, 421-22 (9th Cir. 1988)). "The opinion of a nonexamining physician cannot by itself constitute substantial evidence that justifies the rejection of the opinion of either an examining physician or a treating physician." *Id*. at 831 (citing *Pitzer v. Sullivan*, 908 F.2d 502, 506 n.4 (9th Cir. 1990); *Gallant v. Heckler*, 753 F.2d 1450, 1456 (9th ir. 1984)).

In considering the plaintiff's mental impairments at step two, the ALJ found as follows:

> The [plaintiff's] mental impairments have not been shown to be severe impairments. Dysthymia was listed as a diagnosis in an intake assessment conducted by Jana McGlinn, MA, in November 1998, although her GAF was at 65. In another assessment performed five years later in May 2003, diagnoses were listed of attention deficit hyperactivity disorder (ADHD) by history, a depressive disorder by history, and alcohol and cannabis use that had ended 11 years earlier. However, at that time she was going to college as well as working 34 hours a week, which led to the conclusion that there was "little impairment in any life domains."
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> According to yet another intake assessment that is dated January 4, 2005, the diagnoses were a major depressive disorder that was mild due to the use of medication. Her ADHD was now described as "Not otherwise specified" as the claimant had been off medication for this impairment for the preceding two years.
>
> An extensive evaluation was performed by David Sandvik, M.D., in April 2005. This doctor declared that the evaluation process was ". . . greatly encumbered by her hostility and lack of cooperation." She arrived late at the appointment; she answered questions in a sarcastic manner, if she chose to answer; she refused to lower her voice. Her attitude does not enhance her credibility; a bad attitude is not an impairment.
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> Moreover, she was fully oriented with the ability to interpret proverbs, similarities, and differences normally. According to Dr. Sandvik, her answers, in terms of answers that she gave, were reality based. There was no evidence of tangential or circumstantial thought processes. She was able to repeat digits backward up to 4 and to subtract serial 7's quickly and accurately. Dr. Sandvik listed diagnoses of probable dysthymia, probable impulse control disorder NOS, and rule out paranoid personality disorder. While he indicated some equivocal limitations, he noted that the [plaintiff's] failure to cooperate fully in the examination made it difficult to assess her. Impeding accurate testing of limitations in evaluations militates strongly against credibility. Thomas v. Barnhart, 278 F.3d 947 (9th Cir. 2002)(citing Rautio v. Bowen, 862 F.2d 176, 179-80 (8th Cir. 1988)).
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> As noted, the [plaintiff] reported that she was working as an oversight person for children for 5 hours a week and had done so for at least 4 years. With this information, as well as the host of normal findings noted in the medical record, the [plaintiff] has failed to establish any mental impairment as a severe impairment.
>
> The [plaintiff's] medically determinable mental impairments of dysthymia, impulse control disorder, and personality disorder NOS, considered singly and in combination, do not cause more than minimal limitations in the [plaintiff's] ability to perform basic mental work activities and are therefore nonsevere. In making

> this finding, the undersigned has considered the four broad functional areas set out in the disability regulations for evaluating mental disorders and in section 12.00C of the Listing of Impairments (20 CFR, Part 404, Subpart P, Appendix 1). These four broad functional areas are known as the "paragraph B" criteria.
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> The first functional area is activities of daily living. In this area, the [plaintiff] has mild limitation. The next functional area is social functioning. In this area, the [plaintiff] has mild limitation. The third functional area is concentration, persistence or pace. In this area, the [plaintiff] has mild limitation. The fourth functional area is episodes of decompensation. In this area, the [plaintiff] has experienced no episodes of decompensation. In assessing the "B" criteria, I find no support for the conclusion by the DDS psychologists that the [plaintiff] has more than mild limitations in social functioning.
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> These findings concerning the "B" criteria are based on careful study of all of the evidence. Additionally, these findings have their foundation in the [plaintiff's] employment for an hour or two a day for several years. In engaging in watching children because she enjoys being around them, the [plaintiff] has shown no impediment to work activity in any of the four functional areas. Any personality issues are under her volitional control. There is no indication that the attitudinal issues raised at the examination of Dr. Sandvik are pathological. I note also the GAF of 68 at Exhibit B8F10, and the annotation "little impairment," as well as the GAF of 60 at Exhibit B8F4.
>
> Because the [plaintiff's] medically determinable mental impairments cause no more than "mild" limitation in any of the first three functional areas and "no" limitation in the fourth area, they are nonsevere.

(AR 20-21.)

In finding the plaintiff had no severe mental impairments, the ALJ erred in his evaluation of the medical evidence. On May 6, 2005, state agency psychologist Dr. Clifford diagnosed plaintiff with dysthymia and personality disorder. (AR 274-88.) He opined that the plaintiff had *moderate* difficulties in maintaining social functioning, and thus had a severe impairment. (AR 288.) The ALJ rejected Dr. Clifford's opinion in one sentence, stating, "I find no support for the conclusion by the DDS psychologist that the [plaintiff] has more than mild limitations in social functioning." (AR 21.) Rather, the ALJ based his findings on his

own "careful study of all of the evidence," and on the plaintiff's employment as an elementary school playground monitor for an hour a day for several years. *Id*. As the plaintiff argues, these are not legally sufficient reasons for rejecting Dr. Clifford's opinion.

The ALJ is not bound by findings made by the state agency psychologist, however, he may not ignore the opinion and must explain the weight given to the opinion in his decision. *See* SSR 96-6; 20 C.F.R. §§ 404.1527(f), 416.927(f). The ALJ found Dr. Clifford's opinion was inconsistent with the medical evidence, but did not identify the particular evidence he was referring. "[C]onclusory reasons will not justify an ALJ's rejection of medical opinion." *Regennitter v. Soc. Sec. Comm'r*, 166 F.3d 1294, 1299 (9th Cir. 1999). Furthermore, the fact that plaintiff worked one hour a day does not negate Dr. Clifford's opinion. *Cf. Vertigan v. Halter*, 260 F.3d 1044, 1050 (9th Cir. 2001)("A patient may do [physical] activities despite pain for therapeutic reasons, but that does not mean she could concentrate on work despite the pain or could engage in similar activity for a longer period given the pain involved.") School records show plaintiff has been on medical leave since March 2006. (AR 203.) In addition, school records indicate that plaintiff received multiple unsatisfactory performance appraisals due in part to her inattention, lack of focus, and inability to relate effectively with students, teachers, parents, staff, and supervisors. (AR 207-13, 229, 239-42, 696.) Thus, plaintiff's work one hour a day does not establish that her medically determinable impairments do not significantly limit her ability to perform basic work activities. The ALJ cannot substitute his own opinion of for that of a medical expert by disregarding or manipulating the evidence of record. *Benecke v. Barnhart*, 379 F.3d 587, 594 (9th Cir. 2004).

The ALJ also failed to provide legally sufficient reasons for rejecting the opinion of

examining psychiatrist Dr. Sandvik. On April 12, 2005, Dr. Sandvik performed a psychiatric evaluation of the plaintiff. (AR 386-89.) Dr. Sandvik reported, "the evaluation process was greatly encumbered by [plaintiff's] hostility and lack of cooperation." (AR 389.) Nevertheless, Dr. Sandvik diagnosed plaintiff with probable dysthymia, probable impulse control disorder not otherwise specified ("NOS"), with angry features, and rule-out paranoid personality disorder. (AR 388.) He estimated plaintiff's Global Assessment of Functioning[1] ("GAF") score at 50, indicating serious symptoms. He arrived at the impression that plaintiff had at least moderate to severe symptoms with few friends, and multiple interpersonal conflicts, as well as serious impairments in social and other functioning. (AR 388.)

The ALJ rejected Dr. Sandvik's opinion, finding that plaintiff's "bad attitude;" her ability to interpret proverbs, similarities, and differences normally; and her ability to repeat digits backward up to 4 and subtract serial 7's quickly and accurately, showed that she did not have a severe mental impairment. (AR 20-21.) The ALJ's reason is neither clear and convincing nor specific and legitimate. Rather, the ALJ merely reinterpreted the results of Dr. Sandvik's own mental-status examination and substituted his own lay opinion for that of Dr. Sandvik. Furthermore, the ALJ appears to have required that plaintiff provide evidence of a disabling mental impairments at step two, when the law requires only that plaintiff show mental impairments that have more than a "minimal" impact on her functioning.

Without explanation, the ALJ also stated, "I note also the GAF of 68 and the annotation 'little impairment,' as well as the GAF of 60." (AR 21, internal citations omitted.) The ALJ

[1]The GAF is a subjective determination based on a scale of 1 to 100 of "the clinician's judgment of the individual's overall level of functioning." American Psychiatric Ass'n, Diagnostic and Statistical Manual of Mental Disorders 32 (Text. Rev., 4th ed. 2000).

refers to the May 2003 and January 2005 intake assessments from plaintiff's mental health counselors at Whatcom Counseling & Psychiatric Clinic. (AR 355-65.) The ALJ's reference to these intake assessments is not only ambiguous but misstates the evidence. The May 2003 intake assessment recorded a GAF score of 68, and noted "little impairment in life domains." (AR 361.) However, this assessment predates plaintiff's alleged onset date of January 1, 2004, and does not refute plaintiff's allegation of escalating mental impairments of depression and lack of focus due to ADD. (AR 132, 136-38, 943.) Furthermore, the January 2005 intake assessment recorded a GAF score of 60, which indicates "moderate symptoms," such as a flat affect, occasional panic attacks, or "moderate difficulty in social [or] occupational . . . functioning." American Psychiatric Ass'n, Diagnostic and Statistical Manual of Mental Disorders 32 (Text. Rev., 4th ed. 2000). The assessment noted that plaintiff's "depression caused significant impairment which is mediated by medication," and that plaintiff had discontinued stimulant medication for ADHD in 2003 due to increased blood pressure, and had "moderate symptoms & impairments." (AR 355.) By October 2005, however, plaintiff was again taking medication for ADD/ADHD which continued until at least January 2007. (AR 641, 644, 653, 676-77, 697-98, 750.) Thus, contrary to the ALJ's inference, the 2005 intake assessment is not inconsistent with Dr. Clifford's or Dr. Sandvik's opinions.

In addition to the above doctors, plaintiff's treating doctors, Dr. Pederson and Dr. Steger, diagnosed plaintiff with similar impairments and found similar functional limitations. For example, Dr. Pederson's records show he diagnosed her with depression and ADD and treated her with medications. (AR 657, 668, 696-97.) Dr. Steger conducted psychological testing and diagnosed plaintiff with chronic depression and poorly controlled ADHD, chronic

pain, past substance abuse, and compulsive eating disorder. (AR 506-21.) However, the ALJ did not discuss or reject Dr. Pederson's and Dr. Steger's medical evidence at step two. The Court notes that the ALJ rejected interrogatory forms prepared by Dr. Pederson and Dr. Steger at step four, but never addressed their medical records or diagnoses. (AR 24-25.) This un-rejected medical evidence establishes mental disorders that cause more than a minimal effect on plaintiff's functioning, and should have been evaluated at step two. Even if found to be nonsevere, these medically determinable impairments should have been considered in combination with other severe impairments by the ALJ throughout the sequential evaluation.

B. Residual Functional Capacity Assessment

"RFC is an assessment of an individual's ability to do sustained work-related physical and mental activities in a work setting on a regular and continuing basis. A 'regular and continuing basis' means 8 hours a day, for 5 days a week, or an equivalent work schedule." SSR 96-8p at 1. The RFC assessment must be based on all of the relevant evidence in the case record, such as: medical history; the effects of treatment, including limitations or restrictions imposed by the mechanics of treatment (e.g., side effects of medication); reports of daily activities; lay activities; recorded observations; medical source statements; effects of symptoms, including pain, that are reasonably attributed to a medically determinable impairment; evidence from work attempts; need for structured living environment; and work evaluations. SSR 96.8p.

Here, the RFC at issue states that plaintiff is able to perform the full range of sedentary work. (AR 22.) Because the ALJ failed to properly consider the plaintiff's back impairment and mental impairments at step two of the disability sequential evaluation process, he failed to

assess how the combination of the plaintiff's physical and non-exertional impairments impacted her residual functional capacity. *See Smolen*, 80 F.3d at 1290. Accordingly, on remand, the ALJ will take into account the plaintiff's physical impairments and her non-exertional limitations and reassess her RFC.

C. Step Three Listing of Impairments

Step three of the sequential evaluation process requires the ALJ to determine whether plaintiff's impairments meet or equal any of the listed impairments set forth in Appendix 1 to 20 C.F.R. Part 404, Subpart P. 20 C.F.R. §§ 404.1520(d), 416.920(d). The listings describe specific impairments in each of the body's major systems that are considered "severe enough to prevent a person from doing most gainful activity." 20 C.F.R. §§ 404.1525, 416.925(a). Severe impairments must be "permanent or expected to result in death," or must last or be expected to last for a continuous period of at least twelve months. 20 C.F.R. §§ 404.1525(a), 416.925(a). The ALJ's analysis at step three must rely only on medical evidence and not rely on age, education or work experience. 20 C.F.R. §§ 404.1520(d), 416.920(d); *see also Bates v. Barnhart*, 222 F.Supp.2d 1252, 1258 (D. Kan. 2002). To be found disabled at step three, plaintiff must prove that she meets or equals each of the characteristics of a listed impairment. 20 C.F.R. §§ 404.1525(a), 416.925(a); *see also Burch v. Barnhart*, 400 F.3d 676, 683 (9th Cir. 2005). A claimant who meets or equals a listing is presumed disabled at step three without further inquiry. 20 C.F.R. § 416.920(a)(4)(iii).

Plaintiff argues that the ALJ erred at step three by failing to consider whether her obesity, in combination with her other impairments, met or medically equaled a listed impairment. (Dkt. 13 at 12-15.) With respect to plaintiff's obesity, the ALJ simply stated,

"Obesity is not a listed impairment." (AR 22.)

While obesity has been eliminated as a listing, the Commissioner must determine whether plaintiff's obesity is medically equivalent to one of the other listed impairments. *See* SSR 02-1p. In addition, the Commissioner must determine whether plaintiff's obesity, in combination with her other impairments, meets or equals a listed impairment. *See id*. The current prefaces to the musculoskeletal, respiratory and cardiovascular body system listings provide guidance about the potential side effects obesity has in causing or contributing to impairments in those body systems. *See, e.g*., 20 C.F.R. Part 404, Subpt. P, App. 1, Section 1.00Q. In addition, according to the Commissioner, "obesity may cause or contribute to mental impairments such as depression." SSR 02-1p.

In this case, it is not clear that the ALJ considered whether plaintiff's obesity, alone or in combination with her other impairments, met or medically equaled a listing. Rather, the ALJ's statement that "[o]besity is not a listed impairment," indicates that he did not consider the issue of equivalency. "The record must reflect that an ALJ has 'actually considered equivalence' and simply making a finding that plaintiff's impairments do not meet or equal a listing is insufficient." *James v. Apfel*, 174 F. Supp. 2d 1125, 1130 (W.D. Wash. 2001)(quoting *Marcia v. Sullivan*, 900 F.2d 172, 176 (9th Cir. 1990)). Accordingly, remand is warranted so that the ALJ can reevaluate the listings in light of the Court's decision.

D. Credibility

Plaintiff argues that the ALJ committed additional errors by rejecting her testimony regarding her obesity limitations and by failing to include such limitations in his RFC assessment. (Dkt. 16 at 16-18; Dkt. 15 at 4-8.) Specifically, plaintiff contends that the ALJ

erroneously disregarded her testimony of obesity related limitations which would prevent her from performing a full range of sedentary work, including severe daily fatigue, shortness of breath, difficulties with mobility and increased back pain. (Dkt. 13 at 14; Dkt. 15 at 5.) The Court agrees that the ALJ's reasons for doubting plaintiff's testimony regarding her obesity related limitations are not "specific and legitimate reasons supported by substantial evidence in the record." *Lester*, 81 F.3d at 830.

Credibility determinations are particularly within the province of the ALJ. *Andrews*, 53 F.3d at 1043. Nevertheless, when an ALJ discredits a claimant's testimony, he must articulate specific and adequate reasons for doing so. *Greger v. Barnhart*, 464 F.3d 968, 972 (9th Cir. 2006). The determination of whether to accept a claimant's subjective symptom testimony requires a two-step analysis. 20 C.F.R. §§ 404.1529, 416.929; *Smolen*, 80 F.3d at 1281; Social Security Ruling ("SSR") 96-7p, 1996 WL 374186, *2-3. First, the ALJ must determine whether there is a medically determinable impairment that reasonably could be expected to cause the claimant's symptoms. 20 C.F.R. §§ 404.1529(b), 416.929(b); *Smolen*, 80 F.3d at 1281-82; SSR 96-7p, 1996 WL 374186, *2-3. Once a claimant produces medical evidence of an underlying impairment, the ALJ may not discredit the claimant's testimony as to the severity of symptoms solely because they are unsupported by objective medical evidence. *Bunnell v. Sullivan*, 947 F.2d 341, 343 (9th Cir. 1991)(en banc). Absent affirmative evidence that the claimant is malingering, the ALJ must provide "clear and convincing" reasons for rejecting the claimant's testimony. *Smolen*, 80 F.3d at 1284.

Here, the ALJ rejected plaintiff's testimony, in part, because she had failed to lose weight despite her doctor's recommendations. (AR 24.) The ALJ wrote:

> The [plaintiff's] obesity and its resulting adverse effect on other impairments is the result of her own inaction in following recommendations for diet and exercise. She appears to have aimed at having gastric bypass surgery, rather than attending to the recommendations that she has received. Thus she continued to go to fast food restaurants even though she had been told by Eric Frankenfield, M.D., to consider ". . . those places poisonous to her." With her morbid obesity and deconditioning has come shortness of breath. The [plaintiff's] disinterest in remedying her weight despite its adverse effect suggests that the [plaintiff] is disinterested in returning to full time work activity. Her physician obviously considers her obesity to be to some extent under her own control. Failure to lose weight as recommended may [sic] taken into account in assessing credibility. And medical opinion that exercise and weight loss can alleviate poor medical conditioning is a significant factor in assessing capacity to work.

(AR 24, internal citations omitted.)

A claimant's failure to follow treatment is not a proper reason to reject a claimant's testimony regarding her obesity. *See Orn v. Astrue*, 495 F.3d 625, 636-37 (9th Cir. 2007)(*citing* SSR 02-1p; 20 C.F.R. §§ 404.1530, 416.930). As the Ninth Circuit instructs:

> Before failure to follow treatment for obesity can become an issue in a case, we must first find that the individual is disabled because of obesity or because of obesity and another impairment(s). Our regulations at 20 CFR 404.1530 and 416.930 provide that, in order to get benefits, an individual must follow treatment prescribed by his or her physician if the treatment can restore the ability to work, unless the individual has an acceptable reason for failing to follow the prescribed treatment. We will rarely use "failure to follow treatment" for obesity to deny or cease benefits.
> . . .
> When a treating source has prescribed treatment for obesity, the treatment must clearly be expected to improve the impairment to the extent that the person will not be disabled. . . . The goals of treatment for obesity are generally modest, and treatment is often ineffective. Therefore, we will not find failure to follow prescribed treatment unless there is clear evidence that treatment would be successful.

Id. (quoting SSR 02-1p).

In the instant case, the ALJ did not first find that plaintiff is disabled because of obesity or because of obesity and another impairment. *See id*. He was therefore not permitted to

make failure to follow treatment for obesity an issue in this case. Furthermore, nothing in the record establishes that a diet and exercise plan was prescribed to plaintiff or that any treatment would clearly be successful. Rather, it appears that Dr. Pederson "strongly advised" and "strongly encouraged regular exercise and strict dieting and weight loss." (AR 344-46) "A treating source's statement that an individual 'should' lose weight or has 'been advised' to get more exercise is not prescribed treatment." SSR 02-1p. Moreover, there is no evidence that plaintiff willfully disregarded her doctor's advice to lose weight. The record indicates that plaintiff had been going to support groups and informational meetings, and had tried numerous weight loss programs, including Jenny Craig, Weightwatchers, and Overeaters Anonymous without benefit. (AR 329, 344-46, 353-55, 407-09.) Plaintiff also expressed interest in pursuing bariatric surgery. (AR 344.) Plaintiff's failure to lose weight does not constitute a refusal to undertake the recommended treatment. *See McCall v. Bowen*, 846 F.2d 1317, 1319 (11th Cir. 1988). Based on the record, the ALJ's decision to discredit plaintiff's testimony because of her failure to lose weight was legal error and requires reversal.

V. CONCLUSION

For the foregoing reasons, the Court recommends that this case be REVERSED and REMANDED to the Commissioner for further proceedings consistent with this Court's opinion. A proposed order accompanies this Report and Recommendation.

DATED this 4th day of January, 2011.

Mary Alice Theiler
United States Magistrate Judge